UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
WASHINGTON, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: July 22, 1997

No. 95 INA 469

Betty L. Enge,
Employer

On behalf of

Maria De Lourdes Sousa,
Alien

Appearance: M. C. Liu, Esq.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that Betty L. Enge (Employer), filed on behalf of Maria De Lourdes (Alien), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, and the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On October 21, 1993, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "Domestic Cook, (live-in)" AF 08.[2] The job requirements were two years of experience, and the willingness to remain overtime. References were also required. The job description included planning, preparing and cooking meals, as well as light housekeeping.

Notice of Findings. The CO's September 26, 1994, Notice of Findings (NOF) advised the Employer that certification would be denied, subject to rebuttal of the objections it listed. AF 32. The CO found that (1) the job duties of this position did not constitute full-time employment in the context of the Employer's household; and that (2) the live-in requirement was not normally required for the occupation as defined by the Dictionary of Occupational Titles (DOT). Employer was advised that to rebut these findings she could (1) provide evidence of the business necessity for these requirements and (2) either amend the job duties, or provide documentary evidence that the position was full time. The CO said that such evidence should include details of the daily meals to be prepared by the cook, and the Employer's entertaining schedule during for the twelve month period before the application was filed. Such data was to include the number of the meals served, and the time and duration of the meals. Employer was also told to describe how she managed the cooking arrangements in her household before she filed this application.

Rebuttal. On December 12, 1994, Employer's rebuttal said she had a business necessity for a live-in cook to meet the needs of the Employer's "irregular and lengthy work hours," and her busy travel schedule. Employer said she frequently entertained, and that such occasions required great effort in planning, design, and execution, all of which would be the responsibility of the live-in cook. As to the frequency of such events, Employer said

---

[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. In this case see: DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peals, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

she entertained in five to seven dinners per month and three or four lunches or brunches on weekends. Employer also said that while she had not employed a cook in the past, she and her husband now had such a need in the household because of their "growing professional careers." Employer stated that when she traveled, she would arrive home in the evening time, and "it would be impossible to plan, prepare dinner for myself and my husband."

Final Determination. The CO denied certification in the Final Determination, which was issued January 10, 1995. AF 49. The CO concluded that the issues described in the NOF were not adequately addressed in the rebuttal. The CO said that the Employer did not submit a detailed description of the frequency of household entertaining during the twelve months before the application was filed in spite of the detailed instructions in the NOF. The CO added that the Employer also had failed to establish that she customarily had employed full time cooks in the past.

Appeal. Employer requested review and reconsideration by letter dated February 14, 1995. AF 55. As the Employer requested both reconsideration and administrative review under 20 CFR § 656.21(b)(1), on March 23, 1995, the CO denied the motion for reconsideration on the grounds that Employer's motions had failed to address any issues that could not have been addressed in the rebuttal. AF 56.

DISCUSSION

Employment. 20 CFR § 656.3 defines "employment" as permanent full time work by an employee for an employer other than oneself. The Employer bears the burden of proving that the job offered is permanent and full time.

20 CFR § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Requirements that are not normal for the occupation or not included in the DOT cannot be used in recruiting under the Act and regulations unless the Employer can prove a business necessity for that requirement. The Employer has the burden of proof to establish the business necessity of any such restrictive requirement. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U. S. workers who may apply or qualify for the job opportunity. **Venture International Associates, Ltd,** 87 INA 569 (Jan. 13, 1989)(en banc).

These considerations were the reason that the NOF directed the Employer to provide specific evidence on which the CO could base the determination as to whether this position was full time, and whether the Employer's live-in requirement was a business

necessity. To establish the business necessity for a domestic live-in employee, the Employer must show that the requirement is essential to the performance in a reasonable manner of the job duties required by the Employer. **Marion Graham,** 88 INA 102 (Mar. 14, 1990)(en banc).[3]

Employer's response to the NOF asserted that her irregular hours and entertainment schedule necessitate the hiring of a live-in cook. She has submitted no documentation to substantiate that claim, however. As a result, the Employer showed only that her job requirements are her preferences, not that they are essential to the performance of the job duties. **Mary Stafford,** 88 INA 155 (Mar. 12, 1990). In **Hortensia Vargas,** 91 INA 26 (April 21, 1992), the Board held the employer's argument that the preparation of meals, household cleaning and irregular work hours required a live-in worker to be insufficient to establish the business necessity for a live-in requirement in the absence of Employer's proof to the contrary. The facts of the instant case dictate the same result.

Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

[3]In **Marion Graham,** 88 INA 102(Feb. 2, 1990)(en banc), the Board held that business necessity under 20 CFR § 656.21(b)(2)(iii) does apply to noncommercial enterprises and that, where a live-in requirement was at issue, the Employer must prove that the requirement is essential to the performance of the job. This test relates to the "business" of running a household or managing one's personal affairs. The pertinent proof of the need for a live-on-the-premises requirement is whether such a condition is essential to the worker's performance of the job duties in relation to the employer's occupation or to the employer's commercial activities outside of the home. In such a case, the circumstances of the household, itself, and any other needs of the Employer are relevant to the determination of this issue. In order for written assertions to be weighed as relevant proof of business necessity in this context, they should be sufficiently specific for the CO to determine whether there are cost-effective alternatives to having a live-in worker, and whether the needs of the household for a live-in domestic worker are genuine.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

CASE NO.: 95 INA 469

Betty L. Enge, Employer
Maria De Lourdes, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: June 24, 1997